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Book Review

FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) (Cambridge University Press, New York, 2016)

This publication of reimagined Supreme Court decisions is the latest addition to the growing collection, at least in common law jurisdictions, of this form of feminist scholarship. With its genesis in the work of the judges of the Women's Court of Canada, a fictional court hearing appeals from the Supreme Court of Canada,[1] the critical intellectual exercise of re-writing judgments has resulted in *Feminist Judgments: From Theory to Practice*,[2] *Australian Feminist Judgments: Righting and Rewriting the Law*[3] and the forthcoming *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*.[4] Other projects are under way in the international law space,[5] as well as work focusing on children's rights jurisprudence.[6] At the end of 2017, *Feminist Judgments of Aotearoa New Zealand: Te Rino; a Two-Stranded Rope* will be published.[7]

All this work engages with the questions: What would judicial decisions look like if written from a feminist perspective? Can theory be put into practice in judgment form?[8] The task for the authors of the reimagined judgments (the judges), is to re-write the original decision using feminist reasoning, but limited by the precedents, statutory authority, conventions and social and political commentary and research that existed at that time. These are not projects that re-cast the law with the benefit of changed understandings and theorising about gender, sex, equality and rights, but rather they produce powerful illustrations that feminist reasoning and feminist informed outcomes were possible even at the time the original judgment was written.

Although the feminist judgments projects could be used to add to the case for diversity in judicial appointments, their real significance, in my view, stems

1 (2006) 18(1) Can J Women & L (Special Issue).

2 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing, Oxford, 2010).

3 Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting the Law* (Hart Publishing, Oxford, 2014).

4 Máiréad Enright, Julie McCandless and Aoife O'Donoghue (eds) *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, Oxford, 2017).

5 See Cecilia Marcela Bailliet "Invitation to Participate in the Feminist International Judgments Project" (16 January 2014) IntLawGrrls <https://ilg2.org>.

6 "European Children's Rights Unit" University of Liverpool: Liverpool Law School <www.liverpool.ac.uk/law/research>.

7 Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino; a Two-Stranded Rope* (Hart Publishing, Oxford, 2017).

8 Rosemary Hunter, Clare McGlynn and Erika Rackley "Feminists Judgments: An Introduction" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing, Oxford, 2010) at 3. See further Reg Graycar "A Feminist Adjudication Process: Is there Such a Thing?" in Ulrike Schultz and Gisela Shaw (eds) *Gender and Judging* (Hart Publishing, Oxford, 2013) 435.

from the modelling of alternative judicial reasoning. These feminist judgments will hopefully inform the task of current judges but without doubt they provide valuable teaching tools for use in law schools and to inform judicial education.[9] For example, New Zealand students of criminal law have strong reactions to the decision in *R v Brown*,[10] in which the House of Lords confirmed that a group of men could not escape criminal prosecution for the infliction of serious bodily harm, even though they had consented to such injuries in the context of controlled sexual activity. Students are helped to articulate their response, and to develop their own critique of that ruling, by reading the concurring opinion (to that of Lord Mustill, originally in the minority) of Baroness Robin Mackenzie[11] – as well as the well-crafted accompanying commentary, which includes further insight into why students struggle with the case: "[S]ado-masochism challenges the very logic on which the law depends … [it] is a practice, lifestyle and identity that exists at the limit point of liberalism itself."[12]

Closer to home, the Australian feminist judgments project provides examples of alternative approaches to immigration and asylum decisions – jurisprudence of increasing significance in a world struggling to find safe places for the nearly overwhelming number of people displaced by war, poverty and discrimination. In that collection, Nan Seuffert J, writing for the High Court of Australia, considers the treatment of gay men asylum seekers and the particular challenges faced by them to establish persecution on the basis of their sexual orientation in their home country,[13] a country in which openness about their homosexuality may well have resulted in their death.

Inspired particularly by the United Kingdom feminist judgments project, and assisted in their endeavours by two of the prime movers of that initiative, Rosemary Hunter, Erika Rackley,[14] the project convenors and editors of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* have undertaken a slightly different exercise.[15] Rather than, as in the New Zealand Aotearoa project as well as elsewhere, asking potential judges to suggest judgments they would seek to re-write (on the basis that most feminist academics

9 See further Rosemary Hunter "Feminist judgments as teaching resources" (2012) 2(5) Oñati Socio-Legal Series 47.

10 *R v Brown* [1994] 1 AC 212 (HL).

11 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing, Oxford, 2010) at 247.

12 Matthew Weait and Rosemary Hunter "Commentary on *R v Brown*" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing, Oxford, 2010) 241 at 245 and 246.

13 Nan Seuffert "*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71" in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting the Law* (Hart Publishing, Oxford, 2014) at 120; commentary by Wayne Morgan at 115.

14 Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) at xxxi.

15 Two previous books have focused on the re-writing of two landmark cases of the Supreme Court: Jack Balkin (ed) *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York University Press, New York, 2002) and Jack Balkin (ed) *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (New York University Press, New York, 2005).

and practitioners can readily identify such decisions), they decided to limit the scope to decisions by the United States Supreme Court, due to its influence, its status as the court of last resort and "the degree of freedom provided to the Justices when they author opinions."[16] The project was further limited to cases about gender discrimination or women's rights,[17] with future projects addressing other courts and areas of law.[18]

Even with those limitations, the potential pool of cases was close to 60, and the editors called on their United States-based advisory board, a veritable who's who of queer and feminist legal theorists,[19] to assist with identifying the final potential 30.[20] The judges and commentary writers are drawn from a wide range of legal scholars – predominantly academics, but also some practitioners, with deliberate diversity of gender, sexuality, race and seniority – and including an ordained rabbi.[21] As with the locally-based *Te Rino* project, the editors and contributors believe that feminism is "a movement and mode of inquiry. … not the province of women only",[22] and that the produced work is part of an inclusive social justice project, not one only for those who identify as female or as feminist.[23] Further, there is no particular feminist approach required of the judges. The commentators indeed point out that other critiques could have been possible, or note the limitations of the precedent of the time to progress arguments that would be firmly pressed now.

Twenty-five cases are presented in the book in chronological order, beginning with *Bradwell v Illinois*,[24] an 1873 case known by name at least to many women lawyers in New Zealand, as it involved Myra Bradwell's unsuccessful challenge to the denial of a licence to practise law. Myra Bradwell never again applied for a licence, but in 1890 the Illinois Supreme Court acted on its own motion and admitted her to the state bar, and she was permitted to practise before

16 "Sidebar: Professor Kathy Stanchi on the US Feminist Judgments Project" (24 July 2015) Temple Law Newsroom <www.law.temple.edu/news/>.

17 Kathryn M Stanchi, Linda L Berger and Bridget J Crawford "Introduction to the U.S. feminist judgments project" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 3 at 7.

18 See, for example, Bridget Crawford and Anthony Infanti (eds) *Feminist Judgments: Rewritten Tax Opinions* (Cambridge University Press) (forthcoming).

19 With some notable exceptions – Fran Olsen, Katherine Franke, Christine Littleton and Patricia Williams, to name a few whose work I use in my critical theory courses.

20 Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 3 at 8.

21 Kris McDaniel-Miccio: see "Notes on contributors" Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) at xvii.

22 Kathryn M Stanchi, Linda L Berger and Bridget J Crawford "Introduction to the U.S. feminist judgments project" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 3 at 3.

23 As made clear in the Feminist Judgment Project Aotearoa's call for contributions: see LawNews "New research project to look at New Zealand judgments from a new angle" (16 October 2015) ADLSI <www.adls.org.nz>.

24 *Bradwell v State of Illinois* 83 US 130 (1873).

the Supreme Court in 1892, just before she died of cancer.[25] Justice Phyllis Goldfarb delivers a dissenting opinion which challenges the interpretation of the Fourteenth Amendment applied by the majority, as well as naming the denial as sex discrimination.

The other bookend of the collection is the 2015 decision which is also well-known in many communities in New Zealand, even if not by its name: *Obergefell v Hodges*.[26] This was a much-awaited but not firmly predicted decision which declared unconstitutional several state laws which limited marriage to a union between one man and one woman. However, as noted by commentator Erez Aloni, "[f]or many feminists, Obergefell is a double-edged sword … [as] the majority opinion used rhetoric that stigmatizes people in non-marital unions".[27] This limitation of the original opinion allows Justice Carlos Ball to show "a way to expand the rights of one group without cost to others",[28] an illustration of rights discourse (grounded in feminist critique) that has value across jurisdictions.

My previous knowledge of many of the cases in this substantial piece of work, a good 100 pages longer than previous collections, is based on subject-area expertise – so the judgments I was drawn to read most closely were those dealing with sexual violence, such as *Michael M* (dealing with the gender-specific criminalisation of underage sex, sometimes referred to as statutory rape law).[29] However, reinforcement of cultural norms about sexuality and sexual expression can be found in many of the opinions, as they can be in New Zealand judgments at every level. In *Dothard v Rawlinson*,[30] for example, the Supreme Court upheld an Alabama regulation that prevented women working as corrections officers in a maximum security prison for men (which the Court described as a "jungle atmosphere").[31] The Court's reasoning is shown to be based on the unattributed belief that the mere presence of women could incite the prisoners "deprived of

25 Kimberly Holst "Commentary on *Bradwell v. Illinois*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 55 at 60.

26 *Obergefell v Hodges* 135 S Ct 2584 (2015).

27 Erez Aloni "Commentary on *Obergefell v. Hodges*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 527 at 529.

28 Erez Aloni "Commentary on *Obergefell v. Hodges*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 527 at 529.

29 Margo Kaplan "Commentary on *Michael M. v. Superior Court*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 257 at 257. The commentary writer, Margot Kaplan, refers to Fran Olsen's compelling critique of the decision, which I often use to demonstrate the difficulties of balancing the right to privacy with the right to protection in the context of sexual violence law and practice: Frances Olsen "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 Texas Law Review 387.

30 *Dothard v Rawlinson* 433 US 321 (1977).

31 Brenda V Smith "Commentary on *Dothard v. Rawlinson*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 208 at 209.

a normal heterosexual environment" to attack or sexually assault them.[32] That is, women cause rape by their very presence or to use the words of the majority, by their "very womanhood".[33] These claims have arguably operated to reinforce one of the most enduring and damaging rape myths – and can be seen in various iterations in New Zealand case law over time.[34]

In 1989, for example, Lionel Campbell appealed his sentence and conviction for the indecent assault of a 17-year-old young woman. She had lost her trousers and underwear as the result of previous consensual sexual activity and was naked from the waist down and waiting for her friends outside a nightclub. The defendant indecently assaulted her, chased her and behaved in an aggressive manner to those who tried to assist her. He was sentenced to six months' imprisonment. His sentence appeal was successful, the Court of Appeal noting that "the temptation to which he became exposed by chance [was] no normal incident of life."[35]

Unfortunately the idea that women must take the responsibility of avoiding sexual assault has received recent reinforcement in the context of rugby players' treatment of a hired stripper.[36] However, unlike the silence following the sentence reduction in *Campbell*, public response on social media to the statements of "what did she expect would happen" have exposed and named some of the mythology which supports the culture of gendered violence. It requires a different approach, however, to change judicial reasoning processes.

One of the stated aims of this project, as with the work in other jurisdictions, was to challenge beliefs that Supreme Court opinions are written from a neutral vantage point and followed one inexorable logical path.[37] Rather, as this collection establishes, judicial opinions are often grounded in unarticulated bias. Unreferenced and normative cultural and social beliefs, which privilege a particular gender, race or sexuality, may be given the same weight as legal precedent and inappropriately contribute to the eventual outcome.[38]

Despite the alleged neutrality of the rules and processes of decision-making within the United States judicial system, values and beliefs shaped by experience

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32 Brenda V Smith "Commentary on *Dothard v. Rawlinson*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 208 at 209.

33 Brenda V Smith "Commentary on *Dothard v. Rawlinson*" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 208 at 209.

34 See also generally Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (Routledge, New York, 2005).

35 *R v Campbell* CA 239/89, 4 September 1989 at 3.

36 "Chiefs stripper allegations prompt investigation" *Newshub* (online ed, New Zealand, 4 August 2016).

37 Kathryn M Stanchi, Linda L Berger and Bridget J Crawford "Introduction to the U.S. feminist judgments project" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 3 at 4–5.

38 Kathryn M Stanchi, Linda L Berger and Bridget J Crawford "Introduction to the U.S. feminist judgments project" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, New York, 2016) 3 at 5.

may exert a significant, if difficult-to-see, influence on the judges' interpretation and application of the law.

In proving this claim, this substantial, and undoubtedly soon to be justifiably influential, publication contains rewritten opinions which are currently unfamiliar to New Zealand lawyers and law students. These opinions require the judges to make decisions about the constitutionality (and therefore validity) of legislation – decisions of a type not available to our Supreme Court (at least not with the same consequences). However, the subject matter of these significant decisions of the renowned United States Supreme Court, the carefully crafted rewritten judgments and the exceptional commentaries which chart the development of feminist and queer critical thought over 142 years, make this an intellectual endeavour of worldly value.[39]

In my view, although the original decisions are not referenced in New Zealand appellate courts as often as those from the Canadian and Commonwealth jurisdictions, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* is of no less value in the New Zealand context as those produced by our closer legal neighbours. With regard to all the feminist judgment publications, I continue to strongly recommend that every law academic in New Zealand study at least those cases or commentaries in their area of expertise, and ideally use them as both teaching tools and as exemplars of contemporary critical legal reasoning.[39]

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39 The work of Berta Esperanza Hernández-Truyol "Talking Back: From feminist history and theory to feminist legal methods and judgments" (in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford "Introduction to the U.S. feminist judgments project" in Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds) Feminist Judgments: Rewritten Opinions of the United States Supreme Court (Cambridge University Press, New York, 2016) 24) is also an important contribution – and I especially appreciated the author's take on the history of women judges in the United States, at 39ff.

39 See further Kate Fitz-Gibbon and JaneMaree Maher "Feminist Challenges to the Constraints of Law: Donning Uncomfortable Robes?" (2015) 23 Feminist Legal Studies 253; Rosemary Hunter "The Power of Feminist Judgments?" (2012) 20 Feminist Legal Studies 135; Heather Roberts and Laura Sweeney "Why (Re)Write Judgments?" (2015) 37 Sydney LR 457.